UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

J-SQUARE MARKETING, INC., a corporation of the State of New York,	
Plaintiff	:
-against-	: No. 3:97 CV 0924 (GLG)
	DECISION
SIPEX CORPORATION, a corporation of the State of California; ALTERA CORPORATION, a corporation of the State of California; DATCOM TECHNOLOGIES, INC., a corporation of the State of Massachusetts; CATHERINE HARRINGTON; EMIL VARANO; DAVID MASON; JOHN SALZILLO; and PATRICK COUGHLIN, individuals,	:
Defendants.	:

Plaintiff, J-Square Marketing, Inc., has moved to reopen the time for appeal from a final judgment and to vacate the judgment entered by the Clerk of the Court **[Doc. # 324]**. Since a decision granting the motion to vacate would moot the motion to reopen, we initially consider the motion to vacate. Unfortunately, to do so, we must revisit the long, dreary history of this case.

Background

After two false starts in two other federal district courts, on motion of the defendants, this action was transferred to the District of Connecticut, where venue was proper and the defendants were subject to jurisdiction. As required by the Local Rules of this

District, plaintiff's New Jersey counsel, Charles E. Reuther moved to appear pro hac vice, which motion was granted, and also obtained local counsel. See D. Conn. L. Civ. R. 2(c).

From the outset of his representation of the plaintiff in this district, Mr. Reuther ran into difficulties. He was warned by this Court that if he did not comply with discovery demands and the decisions of the Court, severe action could be taken. See Order of June 22, 1998 (noting that plaintiff had been extremely dilatory in the discovery process and putting it on notice that this type of behavior would not be tolerated and that plaintiff was in jeopardy of having its complaint stricken). Discovery disputes continued and were so numerous that the matter had to be referred to Magistrate Judge Garfinkel to supervise. See Order of Referral dated July 27, 1998. The Magistrate had nothing but difficulty with Mr. Reuther. Finally, on March 4, 1999, at the conclusion of a lengthy hearing, the Magistrate made a recommended ruling, dismissing plaintiff's case and assessing costs and attorney's fees against the plaintiff. See Transcript of March 4, 1999, at 70-79 (describing the "extreme misconduct" and bad faith of the plaintiff, the acts and omissions of counsel). On August 9, 1999, this Court issued a Memorandum Decision adopting and ratifying the recommended ruling of the Magistrate. After a careful review of the numerous and substantive discovery abuses, we made a de novo determination that the actions of Mr.

Reuther required a dismissal of the action with prejudice because of the "extreme circumstances." See Memorandum Decision at 23. We left to the Magistrate's discretion the amount of attorney's fees to be awarded to each defendant. Id. at 25.

On August 23, 1999, after a hearing, the Magistrate issued a recommended ruling concerning the imposition of attorney's fees. (It is worth noting that there had been several earlier rulings of the Magistrate awarding attorney's fees against the plaintiff as sanctions for discovery abuses, but these awards apparently had little impact, if any.) Mr. Reuther then filed an objection to the recommended ruling regarding the imposition of attorney's fees and costs. On that same date, he also filed a notice of appeal with the Second Circuit.

On October 20, 1999, this Court issued its Memorandum Decision concerning plaintiff's objection to the recommended ruling regarding attorney's fees and costs. In this decision, we reaffirmed that we were deferring to the Magistrate Judge's determination as to the amount of fees to be awarded for specific items. This, we noted, was a non-dispositive order that should not be set aside unless clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a). We held that a dispositive order had been entered dismissing the complaint and that the award of attorney's fees "is a part of that dispositive order." See Memorandum Decision of October 20, 1999 at 5. As to his

determination that all of the legal fees in the action should be awarded, we held that only those fees and costs related to the discovery abuses which led to the dismissal of the complaint should be awarded. Id. at 6. We recognized that while it might be difficult to separate the fees involved in discovery misdeeds from the total attorney's fees expended, it was not impossible to do. Id. at 7. To that extent, the plaintiff's objection to the Magistrate's Ruling was granted and the matter was referred back to the Magistrate Judge for a determination consistent with our ruling. Id. at 8.

In the meantime, plaintiff had moved for a certification under Rule 54(b), Fed. R. Civ. P., and for a determination under 28 U.S.C. § 1292(b) concerning the Court's Order of August 9, 1999. We denied the application pursuant to § 1292(b) for two reasons. Because the decision was unique to the facts of this case and had no overall precedential value, we held that it did not involve a controlling question of law as to which there was a substantial ground for difference of opinion. We additionally found that an immediate appeal would not materially advance the termination of the litigation since the Order itself terminated the action against all defendants and what remained, a defendant's permissive counterclaim, was not involved in the Order. See Order of October 21, 1999 at 1As to certification of the Order as a final judgment, we found that question to be more complex. We noted that

> the award of attorney's fees was not collateral to the dismissal of the action but was rather part of the overall sanction. Consequently, until the amount of attorney's fees has been ultimately determined the sanction order is not final for purposes of appeal. . . . The Court of Appeals lacks jurisdiction to decide the issue of the District Court's award of attorney's fees until such time as the amount of fees has been determined by the Court. . . . Consequently, the time is not ripe for entry of partial judgment which would allow an immediate appeal.

Id. at 2 (internal citations omitted). We concluded by stating that our ruling was without prejudice to the filing of a new motion when the amount of attorney's fees had been established. Id. at 3.

It took quite a while to reassess the attorney's fees. The process was delayed by Mr. Reuther's filing a motion to disqualify the Magistrate and a further motion to have the matter temporarily reassigned pending the Magistrate's decision on recusal. (Both of these motions were denied. See Order of January 18, 2000 and Endorsement Order of February 11, 2000.) In his recommended ruling of June 5, 2000, the Magistrate noted that, in separating discovery costs from total legal fees of the defendants, "the Court had little assistance from plaintiff in this unpleasant and time-consuming task. Plaintiff persists, instead, in attempts to relitigate old disputes. The Court, however, has done plaintiff's work and made appropriate and in some cases substantial reductions." See Recommended Ruling of June 5, 2000, at 2. Plaintiff's counsel never specifically claimed

that any of the legal fees had not been expended by defendants. Indeed, he stated in open court that he had no objection to the specific items in the statement of fees, claiming that it was not his obligation to do so.

Plaintiff's objection to the Magistrate's recommended ruling concerning fees and costs was decided in a Memorandum Decision issued on July 27, 2000. We noted that plaintiff's objection was not timely filed, which could have been grounds alone for rejecting it. Reviewing the Magistrate Judge's decision under a clearly erroneous standard, we found no error of law or fact in the recommended ruling and, consequently, adopted his decision as the Court's. See Memorandum Decision of July 27, 2000, at 2. We observed that it was clear that the plaintiff intended to file a notice of appeal (which presumably would include the attorney's fees issue) but we indicated that we had doubts as to whether the Court of Appeals would accept the appeal considering the fact that a counterclaim remained outstanding. We noted that an earlier attempt by plaintiff to appeal had been rejected as premature. See Id. at 3.

Plaintiff did again appeal. Along with this interlocutory appeal, Mr. Reuther filed a motion for reconsideration of the Court's Decision of July 27, 2000. Because an interlocutory appeal had been filed, this Court deferred consideration of the motion for reconsideration until the Court of Appeals determined whether it

would hear the interlocutory appeal. See Endorsement Order of September 27, 2000. We did not suggest that the ruling on attorney's fees was to be withheld until there had been an appeal. Indeed, we continued to be of a mind that the Court of Appeals would not accept this second interlocutory appeal. That is precisely what occurred. The civil appeals management program convinced the plaintiff's counsel that he had filed an improper interlocutory appeal, which should be withdrawn. On October 4, 2000, the Mandate of the Second Circuit issued, withdrawing the appeal. Nevertheless, in November, when defendants moved for an order directing payment of their legal fees, plaintiff resisted, saying that it had filed a notice of appeal with respect to the earlier decisions. See Plaintiff's Opposition to Motion for Order Requiring Payment dated December 11, 2000, at 1. The clear implication of that statement was that an appeal was still pending, when clearly it was not. Mr. Reuther also indicated that he was simultaneously filing a motion for certification under Rule 54(b) and for a determination under 28 U.S.C. § 1292(b) that the Court's decisions of August 9, 1999, and July 28, 2000, involved controlling questions of law for which an immediate appeal would materially advance the litigation. He stated that the Court had indicated that it would view such a motion favorably following the decision on attorney's fees. (This Court had never said anything like that. In our Order of October 21, 1999, on plaintiff's motion for

certification, we found no grounds for a § 1292(b) appeal and left open only the possibility of a Rule 54(b) determination after the amount of attorney's fees had been decided.)

Mr. Reuther did, in fact, file a motion for certification. With respect to his request for certification under Rule 54(b), plaintiff asked the Court to certify both the August 9, 1999 Memorandum Decision (approving the Magistrate's dismissal of the action) and the July 27, 2000 Decision (approving the Magistrate's award of fees) as final judgments. The motion noted that those two decisions disposed of all claims of the plaintiff against the defendants and the only remaining claim in the action was a permissive counterclaim for emotional distress and invasion of privacy by one of the defendants, which had been stayed. See Motion for Certification dated December 11, 2000, at 2. Plaintiff also claimed that even if the stay were lifted, the criteria of Rule 54(b) would have been independently met so that there was no reason to delay appellate review of the Court's decisions. Interestingly, no defendant objected to this motion, apparently because once a judgment was entered the defendants would be in a position to have it satisfied.[1] Accordingly, the motion was granted in the absence of

[1] In the interim, the Court of Appeals issued a mandate dismissing the earlier appeal from an order of August 25, 2000. So far as we can tell, that mandate was in error since there was no August 25th Order of the District Court. Rather, it was on August 25th that the plaintiff filed his interlocutory appeal which was withdrawn a couple of months later.

opposition "to the extent of certifying the Court's memorandum Decision of August 9, 1999 as a final judgment." See Endorsement Ruling of February 7, 2001.

Consequently, on February 13, 2001, a partial judgment was filed by the Clerk of the Court reciting that it was based on the March 4, 1999 Recommended Ruling dismissing the complaint, the August 10, 1999 decision of this Court adopting and approving the Recommended Ruling and referring the issue of attorney's fees to the Magistrate Judge, the June 6, 2000 Recommendation by the Magistrate concerning fees in the reduced amount, and the July 28, 2000 Ruling of this Court adopting that Recommendation. See Partial Judgment dated February 13, 2001. The Partial Judgment and the Court's endorsement order were both promptly docketed by the Clerk.

When this Court heard nothing further from either side, because the permissive counterclaim was still pending, one of my law clerks tried to call Mr. Reuther to find out why there had been no further proceedings or appeals despite the passage of several months since the Court granted the motion for certification. Great difficulty was encountered in doing this. The New Jersey law firm that he had been with and whose name appeared on Mr. Reuther's notice of appearance indicated that he had not been working at that firm for a long period of time and that they did not have his telephone number. Finally, through the New Jersey Bar Association Directory, we obtained a new

office telephone number and spoke with him. Mr. Reuther stated that he had been checking continually with the Clerk's Office for a ruling on his motion for certification, which had not been opposed, and had been told that it had not been ruled upon. (No confirmation of such a claim appears from anyone else.) It developed that he had totally failed to report his change of address to our Clerk's office and to his local counsel. He asked whether he still had time to file an appeal and was told that we doubted it but that we could not advise him on that subject.

Meanwhile, the defendants were attempting to levy on their judgment in New York State, where the plaintiff is located. That and the telephone call from this office led to the current motion to vacate the judgment or to reopen the time for appeal from the certification of partial final judgment.

The Motion to Vacate the Judgment

Initially, we note that the attempt to vacate the judgment, which plaintiff had requested, is an effort to expand the appellate court's jurisdiction by asking the District Court to rewrite history. As the Second Circuit said in its recent decision in United States ex rel. Richard McAllan v. City of New York, No. 99-6150, 2001 WL 395935, at *2, --- F.3d --- (2d Cir. Apr. 19, 2000), "New jurisdictional life cannot be breathed into an appeal whose filing time has already expired, unless unique circumstances so require."

In the papers in support of the motion, Mr. Reuther now concedes that the Clerk's Office did not make any error and that it was his fault in not notifying the Clerk's office of his new address. He states that his first knowledge of the granting of his motion was his receipt of a fax from these Chambers on April 19, 2001. See Plaintiff's Motion to Reopen at 2, ¶ 2. He contends that the amount of fees set by the Magistrate has not been ratified or approved by the Court. That is clearly incorrect in that our July 28, 2000 decision adopted the recommended ruling and, indeed, he included that adoption as part of the appeal he wanted to pursue. He argues further that the intent of this Court was to allow "the issue" to be reviewed on appeal before deciding the motion for reconsideration relating to the amount of fees recommended by the Magistrate. That clearly was never the intent of this Court.[2] The Court simply

[2] The plaintiff claims that the Court reserved decision on its motion to reconsider the decision entered on July 28, 2000. The Court did not "reserve"; rather, it deferred consideration while the attempt to file an interlocutory appeal was pending before the Court of Appeals. The motion for reconsideration was procedurally improper in several respects. The Local Rule involving motions for reconsideration requires that they be filed and served within ten days of the filing of the decision or order from which relief is sought, and shall be accompanied by a memorandum "setting forth concisely the matters or controlling decisions which counsel believes the Court overlooked in the initial decision or order." D. Conn. L. Civ. R. 9(e)1. While the motion starts off with the conclusory statement that it is based on grounds that the Court overlooked controlling authority and based its decision on mistaken facts, it then launches into twelve arguments, many of them new, which do not deal specifically with any controlling authority or mistaken facts. (To the extent that the points were not new, they simply repeated arguments that had previously been made.) A movant is entitled to reargument and reconsideration of a motion upon demonstrating that the Court overlooked controlling decisions or factual matters that were placed before it on the underlying motion. However, a motion for reconsideration and reargument "may

declined to consider a motion for reconsideration filed by a party which had already filed an appeal, thereby divesting this Court of jurisdiction. See Endorsement Ruling of September 26, 2000. He further argues that it was the clear intent of the Orders in this case to allow an appeal to be decided before the Court would consider the calculation of attorney's fees. That, too, was never the intent of this Court. Indeed, we made it quite clear that the dismissal of plaintiff's case and the assessment of fees were part of a single order sanctioning the plaintiff for extreme discovery abuses and that appellate consideration would have to deal with both aspects of this sanction. Plaintiff also argues that there was an intent to defer execution on the judgment pending appeal. There was no such intent. The issue of executing upon the judgment was never raised at any time by any party nor even considered by the Court.

We conclude that the plaintiff got precisely what he asked for in his motion for certification. He is now in the position of the apocryphal boy who murdered his parents and then appeared before the Court pleading for leniency because he was an orphan. Consequently, the motion to vacate the judgment is in all respects denied.

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not advance new facts, issues or arguments not previously presented to the court." Lichtenberg v. Besicorp Group Inc., 204 F.3d 397, 400 (2d Cir. 2000); see also LoSacco v. Middletown, 822 F. Supp. 870, 877 (D. Conn. 1994), aff'd, 33 F.3d 50 (2d Cir. 1994). If plaintiff believed some three months later that his motion for reconsideration was still sub judice, he should not have moved for certification under Rule 54(b) of the Court's July 28, 2000, decision, which approved the Magistrate's fee award.

Motion to Reopen the Time for Appeal

Plaintiff contends that he is entitled to reopen the time for appeal pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure. To be eligible under that Rule, the party must comply with all of the following conditions:

A. the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

B. the moving party did not receive notice of the entry of judgment or order sought to be appealed from the district court or any party within 21 days after entry, and;

C. the Court finds that no party would be prejudiced.

Rule 4(a)(6), Fed. R. App. P.

Plaintiff does not meet these conditions. On February 7, 2001, the Court sent notice to all counsel of record, certifying the Court's August 9, 1999 Order as a final judgment. That Order was sent both to Mr. Reuther and to his local counsel, David J. Robertson. Mr. Reuther states that he did not receive this Order because he had apparently left or been disassociated from his previous firm many months before the Court's Order of February 7, but had not bothered to notify the Court, the Clerk, or these Chambers of his move.

Throughout most of the four years this action has been pending,

Mr. Reuther listed his office address as being with the firm of Kral, Clerkin, Redmond, Ryan, Perry & Girvan, of 43 Maple Avenue, Morristown, New Jersey. Indeed, he is listed on the letterhead as being the managing attorney of that firm. We do not know what led to the disassociation. Mr. Reuther is rather vague about it and the law firm, which has apparently moved its main office to New York (they always had a branch in New York City), seems loath to discuss the matter, except to say that he had not been associated with the firm for a long time. Regardless of the reason, Mr. Reuther blatantly ignored the requirements of Local Rule 2(c)3, that changes in office address require notification to the Clerk within 30 days of such a change. More important, this Court's Local Rule 2(c)1 states that all communications sent by the Court to the local counsel shall have the same force and effect as if they were sent to the out-of-state office of the visiting lawyer. No claim has been made that local counsel Robertson of the law firm of Bai, Pollock & Coyne did not receive that notification. That attorney and his firm were listed on the motion for certification as counsel for the plaintiff. Consequently, it is clear that the plaintiff received notification more than seven days before the motion was made and within 21 days of the entry of the order.

The final requirement is that no party would be prejudiced by extending the appeal period. Rule 4(a)(6)(C), Fed. R. App. P. The

defendants have been vigorously attempting to secure payment of their fees by levying upon assets of the plaintiff in New York State. Plaintiff contends that the defendants have not been prejudiced since he sought and obtained an order to show cause to stay enforcement and "appeared before the Honorable John Austin in the Supreme Court of the State of New York, Nassau County, at which time the Court indicated in conference with counsel that it may grant plaintiff's application for a stay of enforcement of the Partial Judgment in New York, but only upon condition that plaintiff post adequate security." Plaintiff's Reply Memorandum at 3, ¶ 2. Plaintiff states that the parties conferred and agreed to a resolution whereby plaintiff would obtain a surety bond in the sum of $110,000.00 by May 11, 2001, whereupon defendants would release the writ of execution in New York. Id.

Defendants respond that no hearing was conducted in New York, nor did the Judge confer with the parties. Datcom Defendants' Sur-Reply at 2. Rather, the Judge's clerk talked with the attorneys about the possibility of resolving the matter and agreeing to a stipulated order for the Judge to execute. Id. They state that the Court never gave any indication of the Court's assessment of the plaintiff's probability of success.[3] Defendants further state that

[3] I can say from personal experience, having practiced in the New York courts for a number of years, that the practice of having the Judge's law clerk deal with the attorneys on a motion is not at all uncommon.

they were advised that the plaintiff would not meet the deadline for filing a bond as required by the stipulated order, and we have received no confirmation that a bond has been filed. Regardless of the truth of the foregoing, it is clear that the defendants have been prejudiced to some extent by the plaintiff's motion to reopen the time to appeal. They have incurred fees and expenses in connection with their attempts to execute on the judgment, and there is no certainty (or even likelihood) that they will be fully reimbursed for this time, expenditure, and efforts.

The time requirements for taking an appeal have been treated by the courts as especially rigid, and that a district court's authority to extend those limits is quite limited. See McAllan, 2001 WL 395935, at *1; In re Orbitec Corp., 520 F.2d 358, 362 (2d Cir. 1975). As the Court in McAllan held, in a case much more sympathetic to the moving party's position than the instant case, even if the district court believes that the time should be extended because of the facts involved in that case, the district court has no equitable powers to alter appellate timelines, even where the parties have agreed to extend the time to appeal. McAllan, 2001 WL 395935, at *2. The Court further held that the district court has no inherent powers to control proceedings or to enter stays in the interest of equity. As to the failure of Plaintiff's counsel to learn of the entry of the Order by monitoring the docket sheet, even docketing irregularities

in the Clerk's office would not excuse Plaintiff's counsel's failure. See also In re O.P.M. Leasing Services, Inc., 769 F.2d 911, 916 (2d Cir. 1985). McAllan also held that there were no "unique circumstances" even where parties had stipulated to reopening the time for appeal, the district court had approved the extension of time for appeal, and the parties relied upon it. If the facts and circumstances decided in McAllan do not constitute "unique circumstances" and "excusable neglect," then clearly what occurred here does not qualify either. We conclude, therefore, that we do not have the power to reopen the time for appeal, and, under the circumstances and facts recited earlier, we would not exercise such power if we had it. The motion to reopen the time to appeal is also denied.

SO ORDERED.

Dated: May 21, 2001
Waterbury, CT

/s/_____
Gerard L. Goettel
United States District Judge